

AUG 2 1985

IN THE

JOSEPH F. SPANIOLO, JR.  
CLERK**Supreme Court of the United States**

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Petitioner,*

v.

DANTE CARLO CIRAULO,

*Respondent.*ON WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL,  
FIRST APPELLATE DISTRICT**BRIEF AMICI CURIAE OF  
AMERICANS FOR EFFECTIVE LAW  
ENFORCEMENT INC.****JOINED BY  
THE INTERNATIONAL ASSOCIATION OF  
CHIEFS OF POLICE, INC.,  
THE AIRBORNE LAW ENFORCEMENT  
ASSOCIATION, INC.,  
AND THE  
LEGAL FOUNDATION OF AMERICA,  
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IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 16 of the Supreme Court Rules. Counsel to the petitioner has been granted by Hon. John H. Yan De Kamo, Attorney General, State of California, Counsel for the Petitioner, and Marshall W. Krauss, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

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AND THE

LEGAL FOUNDATION OF AMERICA,  
IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. John K. Van De Kamp, Attorney General, State of California, Counsel for the Petitioner, and Marshall W. Krause, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.



### INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty two times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. is a professional service organization and is incorporated as a not-for-profit California corporation. The group has nearly 700 members, all of whom are full-time law enforcement pilots or flight support personnel. The association sponsors an annual three-day national training conference, and six regional aircraft safety seminars each year. Its bi-monthly magazine, *Air Beat*, is dedicated to the safe utilization of aircraft for law enforcement purposes.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt

or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

*Amici's* interest in the instant case arises from our concern that the decision of the court below will unduly hamper the crucial efforts of state and federal law enforcement agencies in their aerial surveillance of illegal marijuana crops. As will be demonstrated, aerial surveillance is the only effective means at the disposal of law enforcement agencies to counter the problem of illegal marijuana cultivation, especially large scale illegal operations.

## ARGUMENT

Americans for Effective Law Enforcement, Inc. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the International Association of Chiefs of Police, Inc., and other national and state law enforcement groups. Those briefs always presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid, rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law, although we fully agree with the legal analysis submitted by the State of California in this case. We confine our brief basically to a suggested resolution of certain important policy issues involved in this case as they pertain to the serious problem of narcotic law enforcement. We have previously made similar arguments in our *amici* brief filed in *Oliver v. United States*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 1735 (1984), and we repeat these arguments as even more relevant now, since the instant case involves aerial surveillance by law enforcement officers.

### I.

#### THE WARRANTLESS AERIAL SURVEILLANCE OF THE DEFENDANT'S FENCED BACKYARD, CONDUCTED FOR THE PURPOSE OF DETERMINING WHETHER MARIJUANA WAS BEING GROWN THERE DID NOT VIOLATE THE DEFENDANT'S PRIVACY RIGHTS UNDER THE FOURTH AMENDMENT.

In this case, the Defendant's land containing the marijuana field lies in close proximity to a regional commercial airport. This fact, together with the approximate distance of two and one half miles separating the marijuana from the airport proper, would be well known to persons in the vicinage and

could be taken into account, even if not in the record.<sup>1</sup> The record, in fact, affirmatively shows that the marijuana field lay directly beneath the flight path of aviation into and out of the regional airport, because the record shows that the officers had problems in avoiding trespass upon the paths of aviation in the flight path. Joint Appendix at p. 38 (Officer Shutz: "We had to watch for other aircraft. We were in a flight line with the San Jose airport.")

*Amici* submit that the inference that thousands of citizens a day may well have overflown this location is fully justified. In the course of a year, overflight observations by citizens could well number in the hundreds of thousands. Such citizens' inability to recognize marijuana, reluctance to make report upon it, or other reasons for non-reporting, are the apparent reasons for the undisturbed growth of Defendant's crop. A warrant based upon such citizens' observations would be appropriate. These considerations both indicate the appropriateness of the officers' conduct and destroy the Defendant's contention that he had a reasonable expectation of privacy from overflight observation of a sight that thousands of people had likely seen in the course of normal aviation. Furthermore, in fashioning a constitutional rule, the Court should consider not only the record facts, but the likelihood, in the setting of a metropolitan homestead, that there will be a metropolitan airport, or many such airports, from which routine overflights will occur involving thousands of persons daily.

There can be no question that the officers had a right to be present in the place in which they were. There can likewise be no doubt of the likelihood that thousands of citizens properly have observed the same sight that the officers saw here. Further, the officers used no powers of observation or otherwise that were not available to citizen observers. The holding by the

<sup>1</sup> These facts are not only notorious to persons of the vicinage but are reflected in sources, such as maps, of which courts readily take judicial knowledge.



court below, *People v. Ciraolo*, 161 Cal. App.3d 1081, 208 Cal. Rptr. 93 (1984), that their conduct was an illegal search is inconsistent with these propositions.

Furthermore, after this Court's decision in *Oliver v. United States*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 1735 (1984), the officers even had the right to overfly for the purpose and with the intention of observing fields of marijuana. The decision below stands for the erroneous proposition that such an officer, rightfully where he is and exercising no powers not available to thousands of other citizen observers, must somehow avert his gaze upon encountering a high fence in his view from the air. An officer thus conducting an *Oliver*-approved overflight would presumably be required to recognize such a fence—a perception that might be difficult from the perspective of airplane flight—and distinguish it from surrounding areas. He would then be required, presumably, to avert his gaze, since it is the act of observation that, in and of itself, violates the asserted privacy interest in question. Indeed, the proper observation of items seen inadvertently because they were in plain view during a lawful *Oliver*-approved overflight would presumably be suppressed under such reasoning. This result is unrealistic because observations from the sky cannot be compartmentalized in such a manner, and it is equally unrealistic to exact such anomalous behavior from airborne officers with respect to sights seen by thousands of similarly situated airborne citizens. It would be no less logical to hold that police officers observing a crime from their patrol vehicle must ignore it if it takes place in a citizen's backyard, since the airplane, the officers, and the opportunities for similar citizens' observations are similar in their propriety.

## II.

### AS A MATTER OF SOUND JUDICIAL POLICY, THE RIGHT TO PRIVACY SHOULD NOT APPLY TO POLICE AERIAL SURVEILLANCE OF LARGE SCALE MARIJUANA GROWING OPERATIONS.

*Amici's* interest in this case specifically focuses on the aerial surveillance of fields which are used to cultivate large quantities of marijuana. Many states have highly effective aerial detection and abatement programs. For example, as pointed out in *amici's* brief in *Oliver v. United States*, *supra*, the Florida Department of Law Enforcement, during calendar 1982, confiscated approximately 43,000 marijuana plants at 337 sites in 41 of the state's 67 counties. At least 95 percent of those seizures were solely the result of an initial aerial surveillance by fixed-wing aircraft, flying at 1,000 feet or higher above ground level. (These facts are revealed in the letter of Feb. 16, 1983, from Robert Cummings, Bureau Chief, Investigative Support Services Bureau, Florida Department of Law Enforcement, included in the Appendix of our brief in *Oliver*).

The Bureau of Narcotic Enforcement of California's Department of Justice operates two fixed-wing aircraft; the United States Drug Enforcement Agency also operates a fixed-wing airplane in the State of California. Together, the three aircraft log approximately 500 hours per year of flight time at heights of 1,000 to 2,000 feet, for marijuana detection purposes. In addition, several rural sheriff's departments and the forestry service operate fixed-wing and rotary aircraft, which are used intermittently for the detection of cultivated marijuana fields.

Seizures in California during 1982 involved 90,367 plants, a total of 134,107 pounds from 1,152 crops. The Chief of the California Bureau of Narcotic Enforcement has estimated that at least 70 percent of the domestic marijuana seized by a search warrant resulted from aerial observations. (These facts are found in a letter of March 3, 1983, from S. C. Helsley, Bureau of Narcotic Enforcement, California Department of Justice, as it appears in the Appendix of our brief in *Oliver*).

Typically, programs like those in California and Florida engage in routine air patrol over counties where marijuana has been previously cultivated. The plants are readily observable at even 2,000 feet or more altitude. In fact, pilots rarely fly low, in order that their observations will not be detected by the growers, and also to ensure the safety of the law enforcement officers. Once a sighting is made, photographs are usually taken. Later the observing officer will file an affidavit in support of a search warrant, accompanied by the photographs.

Aerial surveillance programs are not ordinarily aimed at the private, recreational use of marijuana by a citizen, but at large scale, commercial production. A field devoted to commercial production may have as many as 1,000 plants, with a weight of 2,500 pounds and a wholesale value of \$1,500 to \$2,000 a pound. The effectiveness of such programs was recently reported by Robert Lindsey in the article, "*Raids Reduce California Marijuana Planting 40%*", New York Times, July 25, 1985, p. 10, wherein it was reported that the California program using aerial surveillance had dramatically reduced commercial marijuana growing in that state.

Flight levels are regulated by the Federal Aviation Administration (FAA), United States Department of Transportation (14 C. F. R. Part 91.79). Regulations for fixed-wing general aviation craft establish a minimum height level of 1,000 feet over cities and 500 feet over sparsely populated areas, although one regulation (subpart (d)) provides that helicopters may travel just above ground level, so long as the craft can make a safe landing in an emergency and avoid other hazards. Law enforcement agencies, such as the California Bureau of Narcotic Enforcement and the Florida Department of Law Enforcement, fly fixed-wing aircraft in excess of 1,000 feet and are still able to observe and photograph marijuana-cultivated plots.

*Amici* submit that every landowner is aware of the fact that many thousands of private aircraft are operated for pleasure, crop dusting, pipeline inspection, traffic control and speed detection, and other purposes, at regulated levels. The actual number of private aircraft registered with the FAA, as of 1981, was 257,536. No landowner, therefore, can *reasonably* expect that aircraft will avoid his property, or that the occupants will not look down during overflights.

If the Court is disposed in this case to affirm the decision of the court below, which *amici* submit is not warranted on Fourth Amendment principles, especially in view of the apparent good faith of the law enforcement officers, it should be made clear that the Court's decision will not affect the legality of aerial surveillances for the purposes described in Section II of this brief, i.e., large-scale marijuana growing operations. A person may have a reasonable expectation that narcotics officers will not trespass on his land, evade gates or jump fences, but that person does not have a reasonable expectation that aircraft will not lawfully fly over his property and observe a narcotics growing enterprise in full operation.<sup>2</sup>

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<sup>2</sup> See Annotation, "*Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure*", 56 ALR Fed 772 (1982); Granberg, "*Is Warrantless Aerial Surveillance Constitutional?*" 55 Cal. St. Bar J. 451 (Nov. 1980); Kaye, "*Aerial Surveillance: Private Versus Public Expectations*," 56 Cal. St. Bar J. 258 (June 1981). The use of visual enhancement aids (such as flashlights) also have been consistently upheld by this Court, see e.g., *Brown v. Texas*, 460 U.S. 730, 103 S.Ct. 1535 (1983) and cases cited therein. In that regard, this Court's unanimous decision in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 1086 (1983), adds that "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," referring to the so-called "bumper-beeper."



## CONCLUSION

*Amici* respectfully submit that the decision of the California Court of Appeal should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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